YEKAMBARAN S/O MARIMUTHU

v.

MALAYAWATA STEEL BERHAD

HIGH COURT, PENANG
TAN SRI DATUK EDGAR JOSEPH JR. SCJ
[ORIGINATING SUMMONS
NO. 31-1069-1988]
28 MAY 1993

PRACTICE & PROCEDURE: Discovery - Application for an order of the Court for discovery - Relevance in the context of discovery - Principles and test to be applied in determining question of relevance - Order 24 rr. 1(1) & 3(1) Rules of the High Court 1980.

This was an application by the plaintiff by way of originating summons wherein an order for discovery was sought against the defendant, the plaintiff's former employer, for production of a medical report upon the plaintiff pursuant to which the plaintiff was medically boarded out and for the statement of his excess Employees' Provident Fund contributions and costs. At the hearing the defendant's Counsel made no attempt to oppose the plaintiff's said application despite them filing an affidavit in opposition and left the matter to the Court to decide as to whether or not to grant the said application.

Held:

[1] The essential elements for an order for discovery are threefold, namely first, there must be a "document", secondly, the document must be "relevant" and thirdly, the document must be or have been in the "possession, custody or power" of the person against whom the order for discovery is sought. It is indisputable that the items sought were documents and were in the possession, custody or power of the defendant.

[2] As to "relevance", the Rules of the High Court limit discovery to documents which are "relevant to" or relate to the factual issues in dispute. The discovery obligation applies to documents "relating to matters in question in the action" (O. 24 r. 1(1)) or "relating to any matter in question in the cause or matter" (O. 24 r. 3(1)). In practice, relevance is primarily determined by reference to the pleadings but there need not be pleadings for a matter to be in issue.

[3] Relevance does not extend to documents merely to a party's credibility unless that itself is a fact in issue. However, if the document's relevance is to a fact in issue, not simply to credibility, it had long been settled that relevance of an indirect kind suffices.

[4] It was incumbent for the plaintiff to set out the wrong he believes he has suffered, the reason why he believes this to be so and why it is necessary that the defendant be ordered to give discovery. It was clear that only by obtaining the documents sought could the plaintiff obtain the required information to wage his intended action for wrongful dismissal against the defendant. The documents concerned the plaintiff himself and no one else, were of direct relevance to his grievances, and were indisputably in the possession, custody or power of the defendant.

[5] The Court was satisfied that the plaintiff had issued the originating summons in respect of proceedings to be filed against the defendant in Court. The defendant's application for further argument in open Court was rejected.

[Application allowed with costs].

Cases referred to:

Phillips v. Phillips [1879] 40 LT 815, 821 ***(refd)***
George Ballantine & Sons Ltd. v. Dixon & Son Ltd. [1974] 1 WLR 1125 ***(refd)***
Compaignee Financiere du Pacifique v. Peruvian Guano Co. [1882] 11 QBD 55 ***(refd)***
Format Communications Mfg Ltd. v. ITT (UK) Ltd. [1983] FSR 473 CA ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 24 rr. 1(1), 3(1)

For the plaintiff - Shanthi Muthusamy; M/s. V. Muthusamy & Co.
For the defendant - Kulwant Kaur; M/s. Lim Kim Chuan & Co.

JUDGMENT

Edgar Joseph Jr. SCJ:

The plaintiff herein, a Grade 3 Worker, had applied by way of originating summons for an order against the defendant, his former employer, for production of a medical report upon himself pursuant to which he had been medically boarded out on 26 May 1987, by the defendant, the statement of his excess Employees' Provident Fund contributions and costs.

The affidavit evidence, including the exhibits referred to therein, relied upon by the plaintiff, showed that he had commenced employment

with the defendant as a Grade 3 worker with effect from 5 June 1967 and that having been examined by a panel of doctors on 22 April 1987, the defendant had by letter dated 26 May 1987, informed him that the panel had recommended that he be medically boarded out and that he would be boarded out on medical grounds with effect from 27 May 1987. That letter was in the following terms:

Malayawata Steel Bhd.
P.O. Box 60, 12700 Butterworth,
Province Wellesley, Penang, Malaysia.

Ref: PP/MYS/DBF/104 Date: 26 May 1987

Encik Yekambaran s/o Marimuthu
Through: Head of Blast Furnace Section

Dear Sir

Re: Medical Boarding Out

We wish to inform you that the panel of doctors who examined you on 22 April 1987 have recommended that you be boarded out on medical grounds. In view of the recommendations, you are hereby informed that you will be boarded out on medical grounds effective from 27 May 1987. All benefits due to you will be paid as soon as clearance is obtained from the Income Tax Authorities.

Kindly arrange to return to us the following articles on your last day of service:

1. 3 suits of uniforms.
2. 1 pair of safety shoes.
3. Helmet.
4. An employment pass.

Yours faithfully
Malayawata Steel Bhd.
Sgd.

Nicholas Choo
Manager
Personnel Department

c.c. Head of Blast Furnace Section
UMSW

The plaintiff then consulted his solicitors Messrs. Muthusamy & Co., who, by a letter dated 27 July 1987, applied to the Manager of the Personnel Department of the defendant company for a copy of the relevant medical report mentioning the reasons therefor. That letter was in the following terms:

V. Muthusamy & Co.
Advocates & Solicitors
12, Jalan Selat, Taman Selat,
Off Bagan Luar Road,
12000 Butterworth, P.W.
Tel. Pg. 344727.

27 July 1987.

A.R. Registered
(served)

Manager,
Personnel Department,
Malayawata Steel Bhd.,
P.O. Box 60,
12700 Butterworth.

Dear Sir,

Re: Medical Boarding Out
Encik Yekambaran s/o Marimuthu

We refer to your letter dated 26 May 1987.

Our client, who ceased employment on medical grounds on 27 June 1987, shall be much obliged if you could kindly let us have a certified copy of the report of the medical board so as to enable him to withdraw the contributions due to him from the Employees Provident Fund; to put up his claim for compensation to the SOSCO and also from his insurance company.

Your co-operation is solicited and early reply is greatly appreciated.

Thanking you.

Yours faithfully,
Sgd.

However, there being no satisfactory response from the defendant, the plaintiff's solicitors wrote a reminder dated 23 November 1987, followed by a second reminder dated 6 January 1988 addressed to the Manager of the Personnel Department of the defendant company as follows:

V. Muthusamy & Co.
Advocates & Solicitors
12, Jalan Selat, Taman Selat,
Off Bagan Luar Road,
12000 Butterworth, P.W.
Tel. Pg. 344727.

6 January 1988.

REMINDER

Manager,
Personnel Department,
Malayawata Steel Berhad, A. R. Registered
P.O. Box 60,
12700 Butterworth.

Dear Sir,

Re: Medical Boarding Out
Encik Yekambaran s/o Marimuthu

We refer to your letter dated 27 July 1987 and 26 May 1987 and our letter 27 July 1987 and 23 November 1987.

Our client, who ceased employment on medical grounds on 27 June 1987, shall be much obliged if you could kindly let us have a detailed statement for the excess EPF contributions and clarification for the interest deducted and also a certified copy of the report of the medical board soonest.

Your co-operation is solicited.

Thanking you.

Yours faithfully,
Sgd.

Again, the defendant's failed to comply, and so the plaintiff's solicitors caused to be served upon the Manager of the Personnel Department of the defendant, a letter before action dated 10 March 1988, in the following terms:

V. Muthusamy & Co.
Advocates & Solicitors
12, Jalan Selat, Taman Selat,
Off Bagan Luar Road,
12000 Butterworth, P.W.
Tel. Pg. 344727.

10 March 1988.

A.R. Registered
(Served)

Manager,
Personnel Department,
Malayawata Steel Berhad,
P.O. Box 60,
12700 Butterwoth.

Dear Sir,

Notice Of Action
Re: Medical Boarding Out
Encik Yekambaran s/o Marimuthu

We are instructed to refer to our letter dated 6 January 1988 and earlier letter.

Our client's employment was terminated on medical grounds on 27 June 1987.

We are now instructed to and which we hereby do, to demand from you the following:

(a) A detail statement for the excess EPF contributions and clarification for the interest deducted;
(b) certified copies of the reports of the Medical Board;
(c) a sum of RM435.25 being difference in salary for June 1987; arrears of annual increment for January - June 1987 and 9 1/2 days annual leave which could be sent to our client or to us.

Take Notice that if you fail to comply with our above demand within seven (7) days of receipt hereof by you, we have our client's instructions to institute appropriate proceedings against you without any further reference to you.

Dated 10 March 1988.

Sgd.
Advocates & Solicitors.

Yet again, the defendant failed to comply, and so the plaintiff's solicitors caused to be served upon the defendant a second letter before action dated 21 June 1988 in the following terms:

V. Muthusamy & Co.
Advocates & Solicitors
12, Jalan Selat, Taman Selat,
Off Bagan Luar Road,
12000 Butterworth, P.W.
Tel. Pg. 344727.

21 June 1988.

A.R. Registered

Manager,
Personnel Department,
Malayawata Steel Bhd.,
P.O. Box 60,
12700 Butterwoth.

Dear Sir,

Final Notice Of Action
Re: Medical Boarding Out
Encik Yekambaran s/o Marimuthu

We are instructed to refer to our notice of action dated 10 March 1988.

We have yet to receive the following:

(a) A detail statement for the excess EPF contributions and clarification for the interest deducted;
(b) certified copies of the reports of the medical board;
(c) a sum of RM435.25 being difference in salary for June 1987; arrears of annual increment for January - June 1987 and 9 1/2 days annual leave.

We are now instructed to and which we hereby do, to make this final demand from you for the above immediately which could be sent to our client or to us.

Take Notice that if you still fail to comply with above final demand within seven (7) days of receipt hereof by you, we have our

client's instructions to institute appropriate legal proceedings against you without any further reference to you.

Dated 21 June 1988.

Sgd.
Advocates & Solicitors.

Yet again, the defendant failed to comply and so the plaintiff commenced the proceedings herein.

By their affidavit in opposition affirmed on 26 May 1989, by their Personnel Officer, it was alleged, *inter alia,* as follows:

3. I am advised by the defendant's solicitors and verily believe that the plaintiff is not entitled to the documents since the defendant paid for the report and by that fact the medical report is the property of the defendant. Since the said medical report is the property of the defendant, the plaintiff is therefore not entitled to a copy of the said medical report from the former.
4. The plaintiff is at liberty to buy and/or obtain a copy of the said medical report from the medical board that was appointed.
5. I further state that the plaintiff has been properly rendered with detail statements of his salary together with his contribution to the EPF. I annex herewith a copy of the defendant's letter to the plaintiff's solicitors M/s. Muthusamy & Co. to show that the above mentioned statement was duly sent to the plaintiff and marked as exhibit "A".
6. In the premises thereof, the plaintiff is now no longer entitled to any statements relating to excess EPF contribution.
7. In view of the aforesaid the plaintiff has no right to demand from the defendant the said documents as referred to in paragraph 4 of the said affidavit at this juncture.
8. The plaintiff's claim herein is premature frivolous and an abuse of the process of this Honourable Court.

In response to the affidavit in opposition, the plaintiff affirmed a supplementary affidavit on 24 June 1989 wherein he said, *inter alia,* this:

4. I am advised and verily believe that the medical report is in no way privileged as impliedly asserted by the allegations in paragraph 3 of the said affidavit, and since it concerns me and is the cause for the termination of my employment with the plaintiff, I am entitled to the said document.
5. As asserted in paragraph 4 of the said affidavit, I did make several attempts to obtain a copy of the said medical report from the appointed medical board. I went personally on the 1st occasion and was refused a copy. Upon which I instructed my solicitors Messrs. V. Muthusamy & Co. to write to the defendant. A copy of the said letter is now shown to me and annexed hereto marked "YM-1".

6. However the defendants failed and/or neglected to answer the said request or letter. My solicitors's sent further reminders which were ignored by the defendants.

I then, went personally to the Penang General Hospital to attempt to obtain a copy of the said medical report. However instead of the requested medical report, I was given this letter dated 1 August 1987, a copy of which is now shown to me and annexed hereto marked "YM-2".

8. This letter dated 1 August 1987 being insufficient to put up a claim for compensation to the SOSCO and to my insurance company, I again personally approached members of the medical board but once again I was refused a copy of the said medical report.

9. As regards paragraph 5 of the said affidavit I would like to understand how the said sum of RM937.82 as excess EPF contributions was arrived at and also why the following sums due to me were not paid to me by the defendant:

(i)	Difference in salary for June 1987	RM 51.69
(ii)	Arrears of annual increment January - June 1987 at RM29 per month	RM174.00
(iii)	Annual leave of 9 $^1/_2$ days at RM22.06 per day	RM209.57
		RM435.26

And therefore I believe I am entitled to a detailed statement relating to excess EPF contributions.

10. I have now been informed by SOCSO that I am not entitled to claim under this scheme and yet I have been made to understand that it was due to my disability that I was medically boarded out by the defendant.

11. Further, by the refusal of the defendant to supply a copy of the medical report, it appears doubtful if the medical board did in fact recommend the termination of my service.

12. I am advised and do verily believe that I am entitled to a certified copy of the said medical report, a detailed statement for the excess EPF contributions and clarification for the interest deducted and the said sum of RM435.26, and also that my request for the

above mentioned documents is a fair one and should be fulfilled by the defendant if I was justly and fairly medically boarded out.

Before me, in chambers, both parties were represented and all Counsel for the defendant said was this:

If what is required are copies of the documents mentioned, then leave it to Court.

Clearly, therefore, Counsel for the defendant was not opposing the application but instead was throwing the *onus* on the Court to decide as to whether or not to grant the application.

In the event, in the exercise of my discretion I had made an order as follows:

Defendant to supply copies of the documents described in the originating summons as soon as possible and, in any case, not later than 2 weeks from date hereof. Costs to plaintiff.

The defendant having applied that the application be adjourned into open Court for further arguments, I have issued a certificate of no further argument.

I shall now give my reasons in support of my decision.

The essential elements for an order for discovery are threefold; namely, first there must be a "document", secondly, the document must be "relevant" and thirdly, the document must be or have been in the "possession, custody or power" of the party against whom the order for discovery is sought.

It is indisputable, that the items of which discovery is sought are documents and that they are in the possession, custody or power of the defendant and nothing more need be said about this.

As to "relevance", our Rules of the High Court limit discovery to documents which are "relevant to" or "relate" to the factual issues in dispute.

More particularly, the discovery obligation applies to documents "relating to matters in question in the action" [Rules of the High Court, O. 24, r. 1(1)] or "relating to any matter in question in the cause or matter" [O. 24, r. 3(1)]. In practice, relevance is primarily determined by reference to the pleadings but there need not be a pleading for a matter to be said to be in issue. (See *Phillips v. Phillips* [1879] 40 LT 815, 821).

In this context, relevance is defined broadly. It does not extend to documents relevant **merely** to a party's credibility unless that itself is a fact in issue. (See *George Ballantine & Sons Ltd. v. Dixon & Son Ltd.* [1974] 1 WLR 1125). If, however, the document's relevance is to a fact in issue, not simply to credibility, it has long been settled that relevance of an indirect kind suffices.

The classic authority, on the test for relevance in the context of discovery is *Compaignee Financiere du Pacifique v. Peruvian Guano Co.* [1882] 11 QBD 55 where Brett LJ said this (p. 63):

It seems to me that every document relates to the matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which may - not which must - either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary. I have put in the words "either directly or indirectly", because, as it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of inquiry, which may have either of these two consequences ...

The observation of Edward Bray in his highly regarded work on discovery at p. 18 as to the test of "materiality" merits quotation; there he says this:

... for the purpose of testing the materiality of the discovery to a particular issue ... it is the case of the party seeking the discovery that must be assumed to be true, and not that of the party from whom the discovery is sought.

I note that proposition received judicial approval in *Format Communications Mfg. Ltd. v. ITT (UK) Ltd.* [1983] FSR 473 CA.

In determining the question of relevance, therefore, I would have to apply the principles to be distilled from the authorities which I have cited.

I considered that it was incumbent for the plaintiff to set out the wrong he believes he has suffered, the reason why he believes this to be so and why it is necessary that the defendant be ordered to give discovery.

I also considered that the plaintiff had made it abundantly clear in his affidavits aforesaid that it is only by obtaining the discovery sought that he can obtain the required information to wage his intended action for wrongful dismissal against the defendant. The refusal of the defendant to grant him the documents requested were on grounds which were quite untenable bearing in mind that the copies of the documents sought concerned the plaintiff himself and no one else, were of direct relevance to his grievances, and were indisputably in the possession, custody or power of the defendant - the third of the threefold elements to which I have referred. It is not surprising, therefore, that at the hearing before me, Counsel for the defendant made no attempt to oppose the application but just left the matter to the Court. It would appear, therefore, that the defendant is now changing its tune, but, no doubt, they are entitled to do that. I was also satisfied that the plaintiff had issued the originating summons herein in respect of proceedings intended to be filed against the defendant in Court. Accordingly, I had made the orders aforesaid.